No. 77-746

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIS E. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his convictions for filing false income tax returns on the grounds that the trial court erred in permitting the operators of one-man businesses to be excused from the grand jury and the trial jury and that it erred in excluding evidence of petitioner's failure to claim certain alleged deductions on the tax returns.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on three counts of filing false corporate income tax returns for two corporations that he controlled, in violation of 26 U.S.C. 7206(1) (Pet. App. 2a). The trial court imposed concurrent sentences of imprisonment of a year and a day on each count. The court of appeals affirmed (Pet. App. 1a-8a).

1. Petitioner first argues (Pet. 5, 20-26) that the district court's plan for selection of grand and petit juries was improper because it permitted prospective jurors to be excused, upon their request, if they were the operators of one-man businesses (Pet. App. 17a). This claim was waived by petitioner's failure to raise it in timely fashion. On January 16, 1976, the court set trial in the case for Monday, March 15, 1976. It was not until Friday, March 12, 1976, one working day before trial, that petitioner first made his motions to dismiss the indictment and to quash the general venire on this ground. The trial court properly found that these motions were not timely under Rule 12 of the Federal Rules of Criminal Procedure. The challenges were also untimely under the provisions of the Jury Selection and Service Act. See 28 U.S.C. 1867(a).

At all events, petitioner's claim has no merit. The local plan for the selection of federal juries in the Eastern District of Louisiana permits operators of one-man businesses to be excused upon individual request (Pet. App. 17a). That provision does not make such persons "a cognizable class systematically excluded from petit juries." *United States* v. *Horton*, 526 F. 2d 884, 889 (C.A. 5), certiorari denied, 429 U.S. 820, and cases cited therein. Indeed, under *Horton*, the categorical exclusion of certain occupational groups from jury duty, even if it existed, would be permissible "on the 'bona fide ground that it [is] for the good of the community that their regular work should not be interrupted.'" *Government of the Canal Zone* v. *Scott*, 502 F. 2d 566, 569 (C.A. 5), quoting from *Rawlins* v. *Georgia*, 201 U.S. 638, 640. The exclusion of sole proprietors from jury duty upon request meets that standard.

Moreover, the Jury Selection and Service Act of 1968, 28 U.S. 1861 *et seq.*, refutes petitioner's claim. Section 1863(b)(5) provides that each district court may "specify those groups of persons or occupational classes whose members shall on individual request therefor, be excused from jury service." The statute further states that "[s]uch groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof * * *." See S. Rep. No. 891, 90th Cong., 1st Sess. 28 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 10-11 (1968). See also *United States* v. *Grey*, 355 F. Supp. 529, 531-532 (W.D. Okla.). Indeed, a provision in jury selection plans for the excusing of sole proprietors is common. *United States* v. *Gurney*, 393 F. Supp. 688, 705 (M.D. Fla.) ("plans of at least thirty districts * * * provide for the granting of excuses to sole proprietors").[1]

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[1] *Labat* v. *Bennett*, 365 F. 2d 698 (C.A. 5), upon which petitioner relies (Pet. 21-23), does not support his claim. That case turned upon the systematic exclusion of blacks from juries and only peripherally upon the exclusion of daily wage earners. Moreover, even with respect to daily wage earners, the decision emphasized: (1) the fact that such an exclusion operated to exclude 47% of all black workers in the parish from jury duty, and (2) the fact that there was no statutory authority for the exemption of such wage earners as a class (365 F. 2d at 720). Here, however, petitioner makes no claim of racial exclusion.

Peters v. *Kiff*, 407 U.S. 493, also relied upon by petitioner (Pet. 21, 23), is wholly distinguishable. There, the Court held that a white defendant had standing to challenge the selection of state grand and petit juries, who indicted and convicted him, on the ground that blacks were systematically excluded from those bodies. The present case involves no issue of petitioner's standing to challenge the selection of the juries that indicted and convicted him.

2. Petitioner further argues (Pet. 8-9, 26-34) that the trial court erred in excluding evidence of his failure to claim certain alleged deductions on the tax returns. But as the court of appeals properly pointed out (Pet. App. 3a), petitioner was tried only for willfully making false statements on his corporations' tax returns, so that the correct amount of his tax liability was irrelevant. See, *e.g.*, *Schepps* v. *United States*, 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1); *Silverstein* v. *United States*, 377 F. 2d 269 (C.A. 1); *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822; cf. *United States* v. *Fritz*, 481 F. 2d 644 (C.A. 9); *United States* v. *Jernigan*, 411 F. 2d 471 (C.A. 5), certiorari denied, 396 U.S. 927.

Moreover, petitioner's claimed defense that he relied upon his accountants was properly rejected by the trial judge, since the record shows that he withheld relevant information from his accountants (Pet. App. 5a). Thus, the trial judge did not abuse his discretion in excluding evidence of petitioner's purported reliance upon his accountants, it being reasonable to conclude that the probative value of such evidence was outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury * * *." Fed. R. Evid. 403. At all events, as the court of appeals recognized (Pet. App. 6a), "[w]here reliance on the accountants was relevant, the district court allowed direct evidence on that point."[2]

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[2]Petitioner also argues (Pet. 31) that in his closing argument to the jury the prosecutor unfairly characterized him as a tax evader. But the court of appeals correctly held that "any prejudicial effect that it might have had was cured by the district court's instruction to the jury: whether 'a tax is due or owing by the defendant is immaterial to the charges before you in this case' " (Pet. App. 7a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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